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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 214.

ERNEST R. FORREST, *Petitioner*,

vs.

ARCH R. JACK, Receiver of the Nephi National Bank of Nephi, Utah, A Corporation, *Respondent*.

PETITION FOR REHEARING.

GEORGE P. BARSE,
Attorney for the Receiver of the Nephi National Bank, Nephi, Utah.

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PETITION FOR REHEARING.

Comes now Arch R. Jack, as Receiver of the Nephi National Bank of Nephi, Utah, by George P. Barse, his attorney, by direction of the Comptroller of the Currency, and presents his petition for rehearing of the above entitled cause, and in support thereof respectfully shows:

I. The decision in the instant case is based upon the premise that Section 66, U. S. Code, Title 12, Ch. 2, imposing assessment liability upon the estates of decedents, provides no "*procedure for enforcement of the liability*" and hence that recourse *must* be had to the state laws and procedure "governing claims against estates of deceased persons * * *". The claim of the receiver was disallowed

by the decision, on the theory that under the Utah state procedure concerning the administration of the estates of decedents, the assets of the estate could not be pursued to the defendant as distributee under the estate.

II. The effect of this decision is to cause enforcement of the Federal assessment right to be dependent in each case upon state law and procedure and consequently to preclude uniformity of enforcement of the Federal statute in this class of cases. The decisions in this case and in the companion case of Seabury vs. Green (No. 434) illustrate this. In each case the estate of the decedent was fully able to meet the assessment liability. In the Seabury case the assessment was held collectible from the assets; in the instant case it was held not collectible from the assets because of the effect of the state laws and procedure.

It was undoubtedly the intention of Congress that the National Banking Laws should be of uniform application, in their *substantive or fundamental* aspects, in every state of the Union, particularly with reference to the liquidation of the affairs of national banks in receivership. The principle established in the instant case, affecting as it does, the uniformity of enforcement of assessment liability as a substantive right against the estates of decedents under Section 66, is of great importance in the administration of these receiverships.

III. The oral argument and brief of the receiver presented the case *primarily* from the standpoint of the *substantive* law, and particularly with a view toward showing the application, by analogy, of the case of Matteson v. Dent, 176 U. S. 521, and that the Utah law was similar to the Minnesota law in the Dent case relating to the enforcement of liabilities against assets in the hands of heirs and distributees of the estate of a decedent.

The aspects of the matter from a procedural standpoint, and particularly as to whether Section 66 afforded a procedure for enforcement of the substantive liability against

estates thereunder created, and the consequent question of the necessity for recourse to state procedure, was not emphasized, either in the oral argument or the brief.

In view of the importance of the decision and its effect upon the administration of these receiverships, a careful recheck of the authorities has been made with special reference to the procedural aspect or basis of the decision. The cases so examined, and pertinent to the issue, are listed, under appropriate heads, in the Appendix hereto attached, for such use and reference as to the Court may seem meet and proper. We are convinced, as a result of this reconsideration of the authorities, that Section 66, together with other Federal statutes which must necessarily be read in conjunction with it, *affords full and adequate "procedure for enforcement"* of the assessment liability against the estates of decedents, and that in these types of cases recourse should not be had to the state law and procedure. A brief discussion will follow indicating our reasons in this respect.

It is earnestly requested that before the decision of the Court becomes final, an opportunity be given for a reargument of the procedural issues involved, in view of the fact that they were not primarily in mind in the presentation at the original hearing, at least not from the aspect now indicated to have been in the mind of the Court in rendering the decision; and certainly this phase of the case was not presented to the extent now indicated by the result of the recheck of the authorities to be pertinent to the issue. Our views, based upon the reexamination of the authorities, are next summarized:

(a) Section 41 (16), Ch. 2, Title 28, U. S. Code, confers jurisdiction upon the Federal courts of cases involving the winding up of the affairs of insolvent national banks. Sections 64 and 66 of Ch. 2, Title 12, provide the substantive liability of the estate of a decedent for the assessment. It therefore seems obvious that Congress intended that this

substantive liability should be enforced in accordance with the existing Federal procedure made available by said Section 41 (16). From this it necessarily follows that notwithstanding Section 66 does not *in terms* designate the enforcement procedure, *the available Federal procedure may properly be utilized, and if such available procedure is adequate, no recourse to state law and procedure is either necessary or proper.*

(b) The Seabury case, *supra*, establishes that the liability of a decedent's Estate under Section 66 was not intended to be limited to property actually in the hands of the personal representative at the time a bank becomes insolvent, or when the Comptroller's assessment is made, and that although *legal title* to said assets may have been acquired by the heirs and distributees by virtue of probate distribution, such assets may be followed into the hands of the heirs and distributees for the purpose of satisfying the assessment, where such procedure is appropriate.

(c) A suit to reach such assets, and impress a trust upon them for the debt or assessment, (Matteson vs. Dent, *supra*, holds the contingent assessment liability is a debt or obligation of the estate; also Seabury vs. Green, *supra*) is fundamentally an equitable right and remedy (Humphreys v. Walsh, 248 Fed. 414, 417, 418; McClellan vs. Carland, 187 Fed. 915, 918, 919; Borer v. Chapman, 119 U. S. 587, 599, 600; Board of Public Works v. Columbia College, 17 Wall. 521, 530;—and other cases cited in Notes 2 and 5 Appendix), and has long been recognized as being peculiarly within the ancient jurisdiction of equity, particularly where the assets of the estate had been distributed at the time of the bringing of the action. The present suit was transferred to the equity side by the Circuit Court of Appeals, and was decided by it on the basis of equity jurisdiction and procedure. *It follows that unless the state law and procedure is permitted to prevent enforcement against the heirs and distributees, recovery can be had under the Federal equity procedure.*

(d) Congress intended to preserve a sharp distinction between law and equity in the Federal courts and provided that while the Federal law courts should conform, as near as may be, to the state practice, and follow the laws of the states as rules of decision, the equity courts were expressly exempted from such requirements (Secs. 724, 725, U. S. Code, Ch. 18, Title 28) and the jurisdiction of the Federal equity courts was intended to be based upon that of the English High Court of Chancery and to be uniform throughout the states, without impairment or restriction by state laws. The fact that in a given case relief cannot be afforded in a state chancery court does not preclude such relief being rendered in a Federal equity court where such case comes within the uniform and inherent jurisdiction of the Federal equity court. (Payne v. Hook, 7 Wall. 425, 429; In re Interstate Refineries, Inc., 18 Fed. (2) 360, 361; Matthews v. Rodgers, 284 U. S. 521, 529;—and other cases cited in Notes 1 and 4 of Appendix).

(e) We have not lost sight of the doctrines set forth in the cases in Note 7 of the opinion in the instant case, to the effect that the Federal courts are bound by state statutes of limitation in suits to collect assessment liability, and will ordinarily follow state laws of administration and descent, and that where a creditor, or a receiver representing creditors of a national bank, *has failed to take seasonable action upon an accrued debt or obligation* (as in McClain v. Rankin, 197 U. S. 154, 158; Security Trust Company v. Black River National Bank, 187 U. S. 211, 237), a recovery will not be permitted where it is barred by the state law. However, the authorities very clearly distinguish between cases of the foregoing type, including matters involving the ordinary administration of assets, *and plenary suits involving rights enforceable under the ancient and inherent jurisdiction and procedure of equity*, where the primary question is, not the application of a state statute of limitation or bar, but whether the plaintiff has been guilty of laches

in the enforcement and prosecution of his case, particularly where, as in the instant case, the matter involves the enforcement of a substantive right *created* by Federal statute (as distinguished from state statute), and intended to be enforced under Federal statutes in the Federal courts, and where, further, the receiver never had an opportunity to present the claim against the estate of the decedent, due to the fact that it did not accrue and become enforceable until after the assets had been administered and the estate had been closed. Equity will not permit a right to be without a remedy, and will interfere or intervene, notwithstanding the state statutes of bar or limitation, in order to give relief (see Notes 3, 4, 5-7 of Appendix).

IV. The receiver has the right under the Federal statute to enforce assessment liability against the *record owner* and is not obliged to proceed against the non-record "real" owner. The present decision in effect prevents enforcement against the record owner, *i. e.*, the estate of Henry Forrest and the assets of the same in the hands of the defendant as distributee. Defendant, both as administrator and as beneficiary, *permitted the estate to remain liable of record* instead of causing the stock to be transferred. Under such circumstances it would certainly seem no more than equitable that the estate and the assets derived therefrom continue liable for the assessment. The depositors and creditors had the right to, and presumably did, rely upon the record stock ownership while the bank was a going concern, and it certainly does not seem equitable that they should now be required to resort (through the receiver) to the insolvent estate of the "real" owner and *permit the assets of the record owner to be retained free from the record ownership liability for the assessment.*

V. The undersigned, as counsel for the Receiver (and who is also attorney for the Comptroller of the Currency) has executed as part hereof the required certificate that the foregoing petition for rehearing is presented in good faith

and not for delay. The undersigned desires at this point to state further that careful consideration has been given to the question of the advisability of filing this petition, having in mind the heavy duties and burdens already imposed upon the Court by the cases required or permitted in due course to be heard. It is therefore with reluctance that counsel ventures to add to this burden, and this petition is filed only because of an earnest conviction that the merits of the case, and the importance of the principles involved in connection with the administration of insolvent national banks in receivership, are such as to justify reconsideration and reargument.

Respectfully submitted,

GEORGE P. BARSE,
Attorney for the Receiver of the Nephi National Bank, Nephi, Utah.

CERTIFICATE OF COUNSEL.

I, GEORGE P. BARSE, Counsel for the above named Receiver of the Nephi National Bank, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

GEORGE P. BARSE,
Attorney for the Receiver of the Nephi National Bank, Nephi, Utah.

APPENDIX.

A.

Summary of Principles, Together with Citations and Statutes in Support of Application for Re-Hearing.

1. The jurisdiction of the Federal equity courts is based upon that of the English High Court of Chancery, is uniform in application throughout the States, is not subject to impairment or restriction by State laws, *and the fact that in a given case relief can not be afforded in a State chancery court will not preclude such relief being rendered in a Federal equity court where such case comes within the inherent jurisdiction of the Federal equity court:*

Payne v. Hook, 7 Wall. 425, 429;
In re Interstate Refineries Inc., 18 Fed. (2) 360, 361;
McConihay v. Wright, 121 U. S. 201;
Johnston v. Roe, 1 Fed. Rep. 692, 695, 696;
McClellan et al v. Carland, 187 Fed. 915, 918, 919;
Spencer v. Watkins, 169 Fed. 379, 381-383;
Boyle v. Zacharie et al, 6 Pet. 648, 658;
Mississippi Mills v. Cohn, 150 U. S. 202, 204, 205;
Matthews v. Rodgers, 284 U. S. 521, 529.

2. The ancient doctrines of equity, now constituting part of Federal equity jurisdiction and available under Federal equity procedure, clearly recognized that the assets of a decedent are charged with the payment of his debts and obligations, and that a creditor who did not have opportunity to present his claim in due course of administration of the estate and who was not guilty of laches may pursue the assets into the hands of heirs and distributees. State statutes of limitation and/or of administration, are not necessarily a bar to enforcing such rights but will be considered on the question of laches:

Chewett v. Moran, 17 Fed. 820-824;
Board of Public Works v. Columbia College, 17 Wall. 521, 530, 531;

Williams v. Gibbes, 17 How. 239, 254, 255;
Johnson v. Culbertson, 79 Fed. 5, 6;
Johnston v. Roe, 1 Fed. Rep. 692, 695, 696;
Continental National Bank v. Heilman, 81 Fed. 36, 44;
McClellan et al v. Carland, 187 Fed. 915, 918, 919;
Harrison v Moncravie, 264 Fed. 776-779;
Humphreys v. Walsh, 248 Fed. 414, 417, 418;
Borer v. Chapman, 119 U. S. 587, 599, 600.

3. The Federal equity courts will recognize and follow the State law in matters of administration of estates as such, *but recognize a distinction* between matters involving the ordinary administration of estates, and *plenary suits* to establish an interest in or a trust upon assets either involved in or derived from a decedent's estate; and where a right or claim within the cognizance of equity is involved, under its inherent jurisdiction, the Federal equity courts will proceed with reference thereto, notwithstanding State laws, to the extent necessary to enforce or protect the right:

Harrison v. Moncravie, 264 Fed. 776-779;
McClellan v. Carland, 187 Fed. 915, 918, 919;
Spencer v. Watkins, 169 Fed. 379, 381-383.

4. The Federal equity courts are not *bound* to follow State decisions in cases founded upon *general principles of equity* and will permit no legal right to be without a remedy, notwithstanding the limitations of State law, the theory being that inasmuch as Federal equity jurisdiction *was not derived* from and is not dependent upon the States, *it can not be affected by* the State laws in cases within its inherent jurisdiction:

In re Interstate Refineries Inc., 18 Fed. (2) 360, 361;
McClellan et al. v. Carland, 187 Fed. 915, 918, 919;
Payne v. Hook, 7 Wall. 425, 429;
Johnston v. Roe, 1 Fed. Rep. 692, 695, 696;
Continental National Bank v. Heilman, 81 Fed. 36, 44;
Gest v. Packwood, 39 Fed. 525, 535.

In connection with the question of laches the Federal equity courts consider whether or not the claimant had notice *or had an opportunity to prosecute his claim* and furthermore, where the State statutes of limitation or bar would result in injustice, or in a right existing without a remedy, equity will interfere or intervene, notwithstanding the statute, so as to give relief:

McWilliams v. Excelsior Coal Co., 298 Fed. 884, 887;
Galliher v. Cadwell, 145 U. S. 368, 372;
Schindler v. Spackman, 16 Fed. (2) 45, 48;
Chewett v. Moran, 17 Fed. 820-824;
Borer v. Chapman, 119 U. S. 587, 602 ("It can not be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced" —P. 602);
Continental Natl. Bank v. Heilman, 81 Fed. 36, 44;
Gest v. Packwood, 39 Fed. 525, 535.

5. Federal equity courts recognize that the assets of the estate of a decedent are charged with a trust for the benefit of creditors, heirs, legatees and distributees, and will protect and enforce such trusts and charges:

McClellan et al. v. Carland, 187 Fed. 915, 918, 919;
Harrison v. Moncravie, 264 Fed. 776-779;
Borer v. Chapman, 119 U. S. 587, 602;
Drain v. Stough, 61 Fed. (2) 668, 669;
Payson v. Hadduck, 19 Fed. Case No. 10862, Page 23. (This case deals with assessment liability, the liability of heirs to the extent of assets received, the fact that the assessment liability was contingent and hence not within a non-claims statute, and that under the circumstances the case was peculiarly within the domain of equity.)

6. Federal courts are not bound by State decisions on the question of the validity and existence of rights under a Federal statute:

Johnson v. City of St. Louis, 172 Fed. 31, 35;
Seabury v. Green, No. 434, October Term 1934.

7. Federal Statutes

U. S. Code, Title 28, Chapter 18, Section 724.

CONFORMITY TO PRACTICE IN STATE COURTS. —The practice, pleadings, and forms and modes of proceeding in civil causes, *other than equity and admiralty causes*, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (Italics inserted)

U. S. Code, Title 28, Chapter 18, Section 725.

LAWS OF STATES AS RULES OF DECISION. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in *trials at common law*, in the courts of the United States, in cases where they apply. (Italics inserted)

U. S. Code, Title 28, Chapter 2, Section 41 (16).

ORIGINAL JURISDICTION. The districts courts shall have original jurisdiction as follows:

* * * * * * * * * *

(16) *Suits against national-banking associations.* Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, *and cases for winding up the affairs of any such bank;* * * * (Italics inserted)

U. S. Code, Title 12, Chapter 2, Section 64.

INDIVIDUAL LIABILITY OF SHAREHOLDERS; TRANSFER OF SHARES. The stockholders of every national banking association shall be held individually re-

sponsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, sec. 23, 38 Stat. 273.)

U. S. Code, Title 12, Chapter 2, Section 66.

PERSONAL LIABILITY OF REPRESENTATIVES OF STOCKHOLDERS. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. (R. S. sec. 5152.)